STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TIMOTHY JACKSON and
LOCAL 3394, WISCONSIN STATE EMPLOYEES UNION (WSEU),
AFSCME, COUNCIL 24, AFL-CIO, Complainants,

vs.

THE STATE OF WISCONSIN,
DEPARTMENT OF CORRECTIONS, Respondent.

Case 382
No. 51762
PP(S)-230

Decision No. 28379-B

STATE OF WISCONSIN, Complainant,

vs.

TIMOTHY L. JACKSON, Respondent.

Case 395
No. 52541
PP(S)-241

Decision No. 28415-B

Appearances:

Mr. John C. Talis, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin, appearing on behalf of Timothy Jackson and WSEU and its affiliated Local 3394.

Ms. Teel D. Haas, Attorney at Law, Wisconsin Department of Employment Relations, 137 East Wilson Street, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin.

EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The respective Complainants filed their respective complaints in Cases 382 and 395, above, with the Wisconsin Employment Relations Commission (WERC), alleging that the respective Respondents, above, had committed unfair labor practices within the meaning of the State Employment Labor Relations Act, Sec. 111.80, *et seq*. On May 18, 1995, the WERC issued an order consolidating the complaints for hearing and appointing the undersigned, Marshall L. Gratz, as Examiner.

Pursuant to notice, the Examiner conducted a hearing concerning the complaints on March 26, 1996 at the Public Library in downtown Madison, Wisconsin. At the hearing the Examiner reserved ruling on WSEU and Jackson's motion to dismiss the Case 395 complaint and received the parties' evidence and arguments concerning both complaints. Briefing was completed on August 8, 1996.

The Examiner has considered the record evidence and arguments submitted by the parties. On the basis of the record, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Timothy Jackson (Jackson) is an individual who resides at 539 County Highway "I", Oxford, Wisconsin 53952.

2. Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO (WSEU, or Union) is a labor organization with offices at 8033 Excelsior Drive, Suite "C", Madison, Wisconsin 53717-1903. AFSCME Local 3394, is a local labor organization affiliated with WSEU.

3. The State of Wisconsin is the State Employer. The State's Department of Employment Relations (DER) is statutorily designated to represent the interests of the State for purposes of conducting labor relations involving state employes. DER has offices at 137 East Wilson Street, Madison, Wisconsin 53707-7855.

4. Another of the State's operating departments is its Department of Corrections whose responsibilities include operation of the Columbia Correctional Institution (CCI) at Portage, Wisconsin.

5. At all material times, Jackson has been employed by the State as a Correctional

Officer at CCI.

6. WSEU is the exclusive collective bargaining representative of the Security and Public Safety bargaining unit which, at all material times included Jackson's Correctional Officer position at CCI.

7. At all material times, the State and WSEU have been parties to a collective bargaining agreement which provides, in 13/6/10, as follows:

> 13/6/10 The Employer and the Union agree that it is in the mutual interest of the parties to provide for Alternative Disciplinary Programs for penalties imposed due to sick leave abuse and/or attendance related issues.
>
> The parties agree that when a disciplinary suspension is assessed an employe for sick leave abuse and/or attendance reasons, the employe may, at the employe's option, elect to work the days of suspension and waive an equivalent amount of vacation (annual leave), Personal Holiday, Compensatory Time or Earned Saturday Legal Holiday in lieu of serving the suspension without pay. This option is limited to suspensions of three (3) work days or less and must be selected for the entire period of suspension.
>
> Such disciplinary actions will be considered as a progressive step in the disciplinary process and will be maintained in the employe's Personnel File subject to the provisions of Article XI, Section 14(3). The selection of the Alternative Discipline by an employe does not constitute an admission of wrongdoing. If an employe chooses the option stated above, the right to grieve the disciplinary action under Article IV of the Agreement is waived. Selection of the option stated above will be in writing with a copy provided to the local union and to the employe.

At all material times, Article IV of the parties' agreements has provided for final and binding grievance arbitration, including the following provisions:

> Section 1: Definition
>
> 4/1/1 A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.

. . .

Section 12: Special Arbitration Procedures

4/12/1 In the interest of achieving more efficient handling of routine grievances, including grievances concerning minor discipline, the parties agree to the following special arbitration procedures. These procedures are intended to replace the procedure in Subsection 4/3/1-7 for the resolution of non-precedential grievances as set forth below. If either of the parties believes that a particular case is precedential in nature and therefore not properly handled through these special procedures, that case will be processed through the full arbitration procedure in subsection 4/3/1-7. Cases decided by these methods of dispute resolution shall not be used as precedent in any other proceeding.

. . .

B. Umpire Arbitration Procedure

. . .

(2) The cases presented to the arbitrator will consist of campus, local institution, or work site issues; short-term disciplinary actions (three day or less suspensions without pay); overtime distribution; and other individual situations mutually agreed to.

. . .

(7) The arbitrator will render a final and binding decision on each case at the end of the day on the form provided. The arbitrator may deny, uphold or modify the action of the Employer.

. . .

8. On July 29, 1993, Jackson was issued a suspension letter notifying him that he would be suspended for three days, August 18, 19 and 20, 1993, because he was tardy on July 24, 1993 and because that constituted his fifth incident of tardiness. Among the documents Jackson received with that suspension letter was a blank "Alternate Discipline" form which read, in part, as follows:

ALTERNATE DISCIPLINE

Article XIII, Section 6/10

Employes who are disciplined for sick leave abuse or attendance related issues may choose an alternate discipline as follows:

1. At the employe's option, when a disciplinary suspension is assessed, the employe may elect to work the days of suspension and waive an equivalent amount of Annual Leave, Personal Holiday, Compensatory Time, or earned Saturday Legal Holiday in lieu of serving the suspension with pay.

2. The option is limited to suspensions of 3 days or less, and must be selected for the entire period of suspension.

3. The disciplinary actions will be considered as a progressive step in the disciplinary process.

4. If the employe chooses this option, the discipline remains in his/her personnel file and cannot be grieved.

5. Notice of the election must be provided in writing to the Union.

If choosing the option as explained above, please fill out and sign the form below and return to Bruce Schneider, Personnel Manager. You must notify the Personnel Office at least 5-days in advance of your decision.

Name: _____

Date of Suspension: _____

Number of Hours of Suspension: ____

Waive an equivalent amount of: _____ (example, Vacation, Personal Holiday, Compensatory Time or earned Saturday Legal Holiday).

_____
SIGNATURE

cc: Union
Employe File

9. Jackson completed and signed the Alternate Discipline form, specifying the suspension scheduled for August 18, 19 and 20, involving 24 hours, and waiving an equivalent amount of earned saturday legal holiday leave. Jackson submitted the completed form to Captain Parisi, at some point in time prior to August 18.

10. As a result of Jackson's submission of that form, Jackson worked and was paid as usual for working on August 18, 19 and 20, 1993, rather than losing the wages and vacation and sick leave credits he would have lost had he been suspended without pay on those days; 24 hours of saturday legal holiday leave were deducted from Jackson's accumulated leave balances; and the three-day suspension remained a part of Jackson's personnel file.

11. On or shortly before August 23, 1993, Jackson initiated discussions with his local Steward, Carol Luetkens, about filing a grievance challenging the three-day suspension. Luetkens filed such a grievance on or about August 23, 1993, asserting that the suspension was, for various stated reasons, without just cause and violative of Agreement provisions 4/9/1 and 11/7/5, and requesting, among other things, that the State "(1) make employee whole - wages, benefits and Officer II status; (2) remove all references of this incident from all employee's files & supervisor files; [and] (3) use only the central control clock, as per the memo of July 28, 1993, only for this type of incident in the future."

12. The grievance was initiated at step three of the parties' contractual grievance procedure and was denied by DOC Employment Relations Specialist Tomas C. Garcia on February 9, 1994.

13. Thereafter, Jackson communicated with WSEU Field Representative Harvey Hoeft about appealing the case to arbitration. Hoeft thereafter appealed Jackson's grievance to arbitration by submitting a written appeal dated February 17, 1994.

14. The Union and State chose to apply the umpire arbitration procedure described in Finding of Fact 7, above, to Jackson's grievance. DER Labor Relations specialist Holly Georgell conferred with Hoeft, spoke with Garcia and then met at CCI with Garcia and CCI Personnel Director Bruce Schneider at CCI, reviewed file materials provided to her by Schneider relating to Jackson's grievance, prepared and sent to Hoeft a draft stipulation of facts for use by the umpire, and forwarded the stipulation to the umpire once she and Hoeft were in agreement concerning its contents. As submitted to the umpire, that stipulation contained a statement of issue and a statement of facts relating to the merits of the grievance. The statement of issue read as follows: "STATEMENT OF ISSUE: Did the Employer have just cause to issue the Grievant a three-day suspension? If not, what is the appropriate remedy?" The stipulation also included 11 documents, among which were the grievance and third step response, and the "July 29, 1993 Three-day Suspension Letter", but the stipulation did not reflect the fact that Jackson had opted for the alternate discipline program.

15. The grievance was heard by the umpire Jay Grenig on April 27, 1994. Attending and participating at the hearing were Jackson, Hoeft, Garcia and Georgell. At the hearing, no one asked or said anything about whether Jackson had opted for the alternate discipline program as regards the three day suspension at issue before the umpire. Shortly after the close of the hearing on that day, umpire Grenig ruled in Jackson's favor and ordered the State to "Expunge suspensions; restore 3 days lost wages and benefits."

16. DER sent Schneider a notice directing that the umpire's award be implemented. Schneider gave that form this his payroll person, Nancy Darnell. Darnell returned later and told Schneider "that she couldn't restore any lost wages or benefits because Jackson had not lost wages or benefits because he had opted to forfeit paid leave time for the three days of suspension and had worked those three days. Schneider then searched for and found Jackson's signed Alternate Discipline form in Jackson's "personnel file", attached to the letter of suspension. Schneider then informed Garcia of the existence of the form, and Georgell was subsequently provided with a copy of the signed form, as well. Georgell communicated about the matter to Hoeft and faxed a copy of signed form to Hoeft on June 6, 1994. When subsequent communications did not resolve the matter to the State's satisfaction, Georgell wrote Hoeft on September 20, 1994, as follows concerning the Umpire Award regarding Jackson's grievance:

> Per our telephone conversation today, I am informing you that the Employer will not implement the April 27, 1994 Umpire arbitration award in the above-referenced matter. The Arbitrator has no subject matter jurisdiction to hear the grievance. Under Article 4/3/2, the Arbitrator's authority to hear grievances is directly tied to the Agreement. Article 13/6/10 specifically exempts all grievances from the arbitration process where the grievant has agreed to sign an Alternative Discipline form. In this case, the Grievant signed the Alternative Discipline form, thereby waiving his right to grieve the three-day suspension.
>
> Additionally, the Grievant intentionally withheld the alternative discipline form from the umpire arbitration process. The resulting umpire arbitration award was fraudulently procured by the Grievant in violation of sections 111.84(2)(d) and 788.10[1.](a), Stats.
>
> Finally, while you have stated to me that you were not personally aware that the Grievant signed the Alternative Discipline Form until after the April 27, 1994 arbitration, you have been unwilling to take appropriate steps to resolve this situation. Accordingly, the Employer has taken action on its own consistent with the provisions of the Agreement.

To much the same effect, on the same date, DER Assistant Administrator of Collective bargaining

Glen Blahnik wrote Hoeft as follows:

> This letter is to inform you that we have advised the Department of Corrections not to implement the April 27, 10994 Umpire arbitration award in the above-referenced matter. While there are some lapses on the Employer's part by allowing the grievance to proceed because of misplacement of the Grievant's alternative discipline form, the fact remains that the Grievant voluntarily waived his rights under Article 13/6/10. Simply put, Arbitrator Grenig should have never heard the grievance.
>
> Prior to filing the grievance, the Grievant had full opportunity to confer with the Union representative. At the time the grievance was filed, it was done with the Grievant's full knowledge of his waiver which was or should have been made known to the Union representative. Notwithstanding above, the grievance was filed and only after the April 27, 1994 arbitration hearing was a full disclosure of the Grievant's waiver made. This is fraudulent and in violation of sections 111.84(2)(d) and 788.10[1.](a), Stats.
>
> The success of the umpire process depends largely on the integrity of the parties, and in this case, while errors were made by both parties, the fact remains that the Grievant waived his right to grieve through an exercise of his contractual right.

17. Notwithstanding the issuance of the umpire's award, Jackson's three day suspension has remained a part of the record of discipline in his personnel file, and the 24 hours of Saturday/legal holiday has remained deducted from Jackson's accumulated leave balances because the State has taken no action to comply with the award in either respect.

18. At all times prior to the issuance of the umpire's award, Jackson was without actual knowledge that his submission of the alternate discipline form waived his rights to grieve the subject suspension. When Jackson signed the subject form and when he signed a like form regarding a previous one-day suspension scheduled for May 27, 1993, Jackson did not read the contents of the form. Rather, he acted on the mistaken understanding that by filing the form he would be accepting the terms of the alternate discipline program unless and until those terms were altered through the grievance procedure. He did not grieve the earlier one-day suspension related to the alternate discipline form he signed May 27, 1993, because he felt that suspension was justified. He grieved the subject suspension because he considered it unjustified.

19. At all times prior to the issuance of the umpire's award, Luetkens acted without actual knowledge that Jackson had submitted an alternate discipline form, and without knowledge that an alternate discipline program was available to employes under the agreement, and without

knowledge that an employe opting for alternate discipline under such a program would be waiving the right to grieve about the disciplinary action involved.

20. At all times prior to the issuance of the umpire's award, Hoeft, Garcia, Schneider, Georgell and Umpire Grenig all acted without actual knowledge that Jackson had exercised his alternate discipline option as regards the subject three-day suspension.

21. The State filed its Case 395 complaint against Jackson on April 26, 1996, alleging that Jackson violated Secs. 111.84(2)(c) and (d) and 111.84(3) of SELRA by:

> a. knowingly permitting Hoeft to file the third step grievance after waiving his right to grieve the suspension and after serving the alternate discipline [Case 395 Complaint para. 12]; and
>
> b. appearing and participating in the hearing on his grievance before Umpire Grenig on April 27, 1994.

However, the only conduct that State's Case 395 complaint specifically requests the Commission to declare violative of SELRA was Jackson's "conduct on April 27, 1994."

22. Jackson's conduct referred to in Finding of Fact 21.a., above, constitutes an alleged act that occurred more than one year before the State filed its Case 395 complaint.

23. Jackson's conduct referred to in Finding of Fact 21.b., above, constitutes an alleged act that did not occur more than one year before the State filed its Case 395 complaint.

CONCLUSIONS OF LAW

1. Under SELRA, whether or not the State's submission of issues to umpire Grenig precludes the State from now asserting that Grenig lacked jurisdiction of those issues in the first place, the State is not precluded by that submission from asserting that the particular award issued by Umpire Grenig exceeded the remedial authority of a grievance arbitrator under the Agreement by failing to draw its essence from the Agreement.

2. Under SELRA, to the extent that the award requires the State to expunge Jackson's three day suspension be from his record and to reimburse him for the three days of leave charged in lieu of his serving the suspension, the award modifies or disregards plain and unambiguous provisions of Art. 13/6/10 of the Agreement that suspensions of employes opting for the alternate discipline "will be maintained in the employe's Personnel File" and that the employe electing alternate discipline is to "waive an equivalent amount of [leave] . . . in lieu of serving the suspension without pay." The remedy ordered by umpire Grenig therefore does not draw its

essence from the Agreement and is not enforceable under SELRA. Hence, the State's refusals to comply with the award did not constitute an unfair labor practice within the meaning of Sec. 111.84(1)(e), Stats., or any other portion of SELRA.

4. The availability of a Sec. 788.10, Stats., action in circuit court to vacate the Grenig award does not preclude the State from defending its award noncompliance in Case 382 on the grounds that the award was allegedly procured by fraud and does not preclude the State from filing and pursuing the allegations contained in its Case 395 complaint against Jackson.

5. The State's Case 395 complaint allegation that Jackson violated SELRA by the conduct referred to in Finding of Fact 21.a., above, was not timely filed within the meaning of the applicable statute of limitations in Sec. 111.07(14), Stats.

6. The State's Case 395 complaint allegation that Jackson violated SELRA by the conduct referred to in Finding of Fact 21.b., above, was timely filed within the meaning of the applicable statute of limitations in Sec. 111.07(14), Stats.

7. By participating in the April 27, 1994 arbitration hearing without mentioning that he had previously opted for alternate discipline with respect to the suspension at issue in the arbitration, Jackson did not:

a. procure the resultant award by fraud within meaning of Sec 788.10, Stats.;

b. violate a collective bargaining agreement within the meaning of Sec. 111.84(2)(c), Stats;

c. commit a refusal to bargain collectively within meaning of Sec. 111.84(2)(d), Stats.;

d. cause the Union to commit an unfair labor practice within the meaning of Sec. 111.84(2), Stats.; and/or

e. otherwise commit an unfair labor practice within the meaning of Sec. 111.84(3), Stats.

ORDER

1. The Union's and Jackson's Case 382 complaint is dismissed in all respects.

2. The Union's and Jackson's pre-hearing motion to dismiss Case 395 on grounds that

under Sec. 788.10, Stats., the circuit court has exclusive jurisdiction of the subject matter of that complaint, is denied.

3. The State's Case 395 complaint is dismissed in all respects.

4. The requests in both cases for orders requiring the respective Respondents to pay the respective Complainants' costs, disbursements and/or attorney's fees are denied.

Dated at Shorewood, Wisconsin, this 4th day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

STATE OF WISCONSIN, Cases 382 and 395

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Pleadings

This decision addresses two separate complaints which the WERC ordered consolidated over the objections of the Union and Jackson.

In their Case 382 complaint, the Union and Jackson allege that the State's refusal to comply with a grievance arbitration award in Jackson's favor ordering the State to expunge a 3-day suspension from his record and to restore to Jackson lost wages and benefits directly violates SELRA Sec. 111.84(1)(e), Stats., and indirectly violates Secs. 111.84(1)(c) and (1)(a), Stats. The Union and Jackson request relief in the form of a cease and desist order, notice posting, payment of the union's costs, including attorneys fees, expenses and disbursements, and an order that "requires the full and complete reinstatement of Jackson with full back pay, fringes, damages as soon as possible together with interest."

The State responds by admitting that it has refused to comply with the award involved. However, the State asserts that its refusal was lawful for the following reasons: the award exceeded arbitrator's authority because Jackson had previously waived the right to grieve the suspension; the award is unenforceable because it was procured by fraud; and literal compliance with the portion of the award requiring the State to "Expunge suspensions; restore 3 days lost wages and benefits" is impossible because Jackson lost no wages or benefits on those days. The State therefore requests that the Case 382 complaint be dismissed and that the WERC order the Union and Jackson to reimburse the State for its attorneys fees, costs and disbursements incurred in the matter.

The State's Case 395 complaint names only Jackson as a Respondent, not the Union. In that complaint, the State alleges that Jackson procured the award involved by fraud and violated SELRA by participating in grieving and arbitrating the suspension without revealing to the Union or the State that he had previously opted to waive his right to grieve the suspension under the Agreement alternate discipline program. More specifically, the State alleges that Jackson thereby committed: a refusal to bargain collectively within the meaning of SELRA Sec. 111.84(2)(c), Stats.; a violation of the collective bargaining agreement in effect between the Union and the State, within the meaning of SELRA Sec. 111.84(2)(d), Stats.; and a violation of Sec. 111.84(3), Stats. By way of remedy, the State requests that Jackson's conduct on April 27, 1994 be declared violative of SELRA; that Jackson be ordered to cease and desist from

such conduct; and that Jackson post a notice or otherwise communicate in writing to members of the bargaining unit that he violated SELRA.

Jackson responds that the State's complaint states no cause of action against an individual employe; that the complaint or at least portions of it are out of time under the applicable one-year statute of limitation; and that the WERC should therefore dismiss the State's complaint and order the State to pay Jackson's attorney's fees. In addition, shortly before the hearing, the Union and Jackson moved for dismissal of the State's complaint in Case 395 on grounds that a Sec. 788.10(1) action in circuit court is the exclusive forum in which State could have obtained adjudication of the allegations contained in the State's complaint. At the hearing, the Examiner reserved ruling on that motion until cases were fully heard and argued.

Factual Background

The basic facts giving rise to the complaints are set forth in the Findings of Fact and need not be fully restated here. The following factual summary outlines the key developments, supplemented with some additional factual background.

When Grievant was notified that he was being issued a three-day suspension for alleged tardiness, the written suspension notice stated that the suspension would take effect on August 18, 19 and 20, 1993. It included a form offering Grievant the alternate discipline plan newly provided for in parties November 3, 1991 to June 30, 1993 Agreement (Agreement). The Agreement was extended by mutual agreement of the parties until a new agreement took effect for a term of November 13, 1993 to June 30, 1995. The successor agreement did not change the relevant agreement provisions. Pertinent agreement provisions are set forth in Finding of Fact 7.

Jackson exercised that option by signing a form which read as set forth in Finding of Fact 8. Jackson submitted the form and it was honored such that he worked and was paid as usual for the three days involved; he was charged 24 hours of Saturday/legal holiday leave; and the three-day suspension remained a part of his disciplinary record. Grievant thereby avoided the need to take three days off without pay and avoided the losses of proportionate amounts of accumulated vacation leave and accumulated sick leave that he would have suffered had he actually served the suspension.

Despite having signed that form and worked the time, Grievant thereafter contacted his steward and initiated a grievance challenging the suspension on the grounds that he should not have been considered tardy on the date in question, all things considered.

In his complaint hearing testimony, Grievant explained that at the time of the suspension, he was involved in a divorce and could not afford to lose work time and money, so he opted for alternate discipline. Grievant had previously signed and submitted such a form regarding an earlier suspension. In that regard, Grievant testified that he did not dispute the merits of that suspension, so he did not pursue a grievance about it. Grievant testified that he did not realize that opting for the alternate discipline plan required him to waive his right to grieve the suspension. He admits that the form he signed clearly states that he was waiving that right, but he testified that he did not read the form before signing it. He stated that he often does not read all parts of documents before signing them, even those involved in his divorce.

Jackson's grievance at issue in the instant cases was initially processed at the third step of the grievance procedure by means of a meeting attended by Jackson, WSEU District Representative Harvey Hoeft, the local union president, and third step DOC hearing officer Tomas Garcia. (tr. 67) The merits of the grievance were discussed at that meeting and subsequently further investigated by Garcia. Garcia ultimately denied the grievance on its merits. No one asked or said anything about whether Grievant had exercised the alternate discipline option at any point in the processing of the grievance to that point.

Hoeft then appealed the grievance to the expedited umpire arbitration process. The grievance was then investigated by Holly Georgell, an attorney employed in a non-attorney position on the DER collective bargaining staff. Georgell developed a proposed stipulation of fact which was reviewed by Hoeft and revised to their mutual satisfaction and ultimately presented to the Umpire, Professor Jay Grenig, at an umpire arbitration conducted on April 27, 1994.

Georgell testified that during the course of her investigation she went to the Personnel Department at CCI and reviewed what she characterized as Grievant's personnel file. She described the file she reviewed as one containing Grievant's disciplinary history. She reviewed the file page by page, cover to cover. She stated that the file she reviewed included the signed copy of the alternate disciplinary plan form that Grievant had submitted regarding the May, 1993 1-day suspension and the documents notifying Grievant of the 3-day suspension, including the blank alternate discipline form given to Jackson with that notice. Georgell testified that she wondered at the time whether Grievant had also signed an alternate discipline form regarding the instant suspension. Accordingly, she recalls having asked whether there was anything else to review relating to Grievant's 3-day suspension and she recalls being told that the CCI Personnel Department had nothing else. (tr. 133) Georgell also testified that she was relatively new to her job at that time, having then held it for approximately a year and one-half.

CCI Personnel Director Bruce Schneider testified that he did not recall Georgell reviewing Jackson's personnel file, which contains originals of disciplinary and a variety of other documents and into which signed alternate discipline forms were ultimately placed. He recalled that Georgell had, instead, reviewed the discipline file that he separately maintains, which contains documents related to each employe's disciplinary history but to which alternate discipline forms were not routinely routed. Schneider testified that he was on illness leave for three months beginning in March of 1993 and on and off thereafter until he fully recovered from open heart surgery in or about December of that year. He explained that the alternate discipline program was new and rarely invoked, and not at the forefront of anyone's consciousness. He testified that the procedures initially put into place had the original of the signed alternate discipline form going to the employe's personnel file after being processed through payroll, and that a copy was sent to the local union president. (tr. 203-4). After the problem was encountered in this case a date line was added to the form and copies were also routinely routed to the employe's personnel file, to the local union president, to the immediate supervisor, to payroll and to the personnel manager. (tr. 213-14) No copy is routinely sent to the WSEU in Madison under either arrangement, however.

The instant grievance and several others were processed by umpire Grenig in the manner prescribed in the agreement for the expedited umpire procedure. Specifically, he had in advance the facts stipulated by the parties, arguments were presented to him by Georgell and Hoeft, the Grievant and steward were each offered an opportunity by the umpire to state anything they wished to add. The process as agreed upon and administered by the parties does not involve the parties' representatives calling or questioning any witnesses. Only the umpire calls upon individuals for information or statements.

No one asked or said anything at the hearing about the existence of a signed alternate discipline form. The umpire issued his award that day in the usual form, announcing it orally and then confirming it in writing by executing a one-page form. The disposition was as noted in Finding of Fact 15, above.

Georgell sent a copy of the award in the customary fashion to CCI with a letter directing CCI to implement it. Schneider received and passed that along to payroll and benefits specialist Nancy Darnell with directions to expunge the suspension and restore the lost wages and benefits. Upon review of her payroll records, Darnell discovered that her records showed that Jackson had worked and been paid full wages and benefits for the three days in question and had been charged Saturday/legal holiday, all pursuant to Jackson's having opted for alternate discipline. Darnell reported that to Schneider. Garcia and Georgell were subsequently informed, and no action was taken by the State then or thereafter to implement the award.

Georgell testified that she informed Hoeft of the existence of the signed alternate discipline form on or about May 13-16, 1994. (tr. 145). She asserts that after returning from a long-planned vacation, she spoke again about the matter to Hoeft who asked her for documentation. Georgell stated that she and DER chose not to take a formal position on the matter until they had heard informally from the Union what position it took.

In subsequent conversations, however, (at least one of which was, by both accounts, heated) Hoeft told Georgell that the Union's position was that the State should have raised the arbitrability issue prior to the issuance of the award, and that neither the Union nor Jackson were obligated to have discovered or revealed the existence of the form during the processing of the grievance.

After further consultations with DER legal staff, Georgell wrote Grenig requesting that he reopen the matter on the grounds that the grievance was not properly the subject of an arbitration. The Union objected that the umpire no longer had jurisdiction of the matter because the award had been issued. Grenig replied that in the absence of mutual agreement to reopen, he was without authority to do so.

Thereafter, both Georgell and DER Assistant Administrator of Collective Bargaining Glen Blahnik ultimately wrote the Union advising that the State would not comply with the award, as noted in greater detail in Finding of Fact 16.

In his complaint hearing testimony, Hoeft admitted that the Agreement and the alternate discipline form both clearly provide that by opting for alternate discipline the Grievant waived any right to grieve the suspension. Hoeft asserted, however, that the State had Jackson's signed form on file and that the existence of the form was a defense that the State could and should have raised before the award was issued. Hoeft acknowledged that had the State raised the issue before the award was issued, or had Hoeft otherwise learned before the award was issued that Grievant had previously opted for alternate discipline in the case, the Union would have dropped the grievance. However, once the award was issued, Hoeft testified that it is his and the Union's belief that neither the Union nor the State can raise newly-discovered evidence to alter the outcome. Otherwise grievance disputes would never be finally resolved. Moreover, Hoeft explained, the Union loses face with its members when on the one hand it resists efforts to appeal adverse awards by stating that awards are final and binding with little hope of reversal on appeal, but on the other hand it must try to explain to its members why the State is not similarly required to live with an award adverse to it.

POSITIONS OF THE PARTIES

The parties submitted extensive written arguments advancing their respective positions in considerable detail. Those contentions and citations of authority have been considered by the Examiner, but they are not recited in this decision except to the extent necessary to explain the rationale for the Examiner's decision.

DISCUSSION

The various issues joined by the pleadings in the two cases, and the Examiner's resolution of those issues, are addressed below.

Effect of Alternate Discipline Program Agreement Provisions on Enforceability of Award

The parties' primary focus in these cases has been on whether the award is an enforceable basis on which to require the State to remove the suspension from Jackson's record and to pay him for the three days of paid leave charged in lieu of time off without pay. The Examiner has concluded that it is not enforceable in either of those regards because those remedy elements -- through no fault of the umpire -- disregard or modify plain and unambiguous provisions of the Agreement such that they do not draw their essence from the Agreement.

The Wisconsin Supreme Court discussed the standards for review of an arbitrator's remedies in CITY OF MILWAUKEE V. MILWAUKEE POLICE ASSOCIATION, 97 Wis.2d 15 (1980), as follows:

> Judicial review of an arbitrator's decision is quite limited. The merits of the arbitration award are not within the province of courts on review. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." UNITED STEELWORKERS OF AMERICA V. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593, 596 (1960). . . . The decision of the arbitrator will not be disturbed for an error of law or fact. JOINT SCHOOL DISTRICT NO. 10 V. JEFFERSON ED. ASSO., 78 Wis.2d 94, 117-118, 253 N.W.2d 536 (1977).
>
> The arbitrator's power to make an award is not unlimited. The power of the arbitrator is derived from the contract and is limited by the terms of the contract:

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." UNITED STEELWORKERS OF AMERICA V. ENTERPRISE WHEEL & CAR CO., 363 U.S. at 597; see also, ALEXANDER V. GARDNER-DENVER CO., 415 U.S. 36, 53-54 (1974).

When a grievance is properly before the arbitrator for his decision, the court will overturn the award made when there has been a perverse misconstruction or positive misconduct plainly established, or if the award is illegal or violates a strong public policy or if there is a manifest disregard of the law. MILW. BD. SCH. DIRS. V. MILW. TEACHERS' ASSO., 93 Wis.2d at 422; JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSO., 78 Wis.2d 94, 117-118, 253 N.W.2d 536 (1977). . . . Sec. 298.10, Stats. (1973) provided for the vacation of an arbitrator's award under approximately the same circumstances allowed at common law. . . . [reciting the contents of 298.10 which parallel the current 788.10]

We must look to whether the arbitrator exceeded the limits of his power under the contract. If the arbitrator in effect undertook to amend the contract, to substitute his own discretion for that vested in one or another of the parties or if the arbitrator acted to dispense his own brand of justice the award will be vacated. TIMKIN CO. V. LOCAL UNION NO. 1123, UNITED STEELWORKERS OF AMERICA, AFL-CIO, 482 F.2d 1012, 1014-1015 (6th Cir. 1974); DETROIT COIL CO. V. INTERN. ASS'N. OF M. & A., WORKERS, LODGE #82, 594 F.2d 575 (6th Cir.), cert. denied 444 U.S. 840 (1979). The arbitrator is free to give his own construction to ambiguous language in the collective bargaining agreement but he is without authority to disregard or modify plain and unambiguous provisions. MONOGAHELA POWER CO. V. LOCAL NO. 2332 INTERNATIONAL BRO. OF EL. WORKERS, 566 F.2d 1196, 1199 (4th Cir. 1975). The award must "draw its essence" from the collective bargaining agreement. WASHINGTON-BALTIMORE NEWSPAPER GUILD V. BUREAU OF NATIONAL AFFAIRS, 97 L.R.R.M. 3068, 3069 (D.D.C. 1978).

> With these principles in mind we must analyze the relevant contract provisions to determine whether the arbitrator exceeded the outer bounds of his power.

Id. at 25-27. ACCORD, MILWAUKEE PROFESSIONAL FIREFIGHTERS, LOCAL 215 V. CITY OF MILWAUKEE, 78 Wis.2d 1 (1977)(holding portion of remedy exceeded arbitrator's authority.)

The remedy ordered in the instant award calls upon the State to, "Expunge suspensions; restore 3 days lost wages and benefits." The Union and Jackson assert that the State's refusals to expunge the suspension from Jackson's record and to restore the three days of paid leave violate the award and therefore violate Sec. 111.84(1)(e) and other provisions of SELRA.

However, the Agreement specifically and expressly provides in 13/6/10 that where an employe has opted for alternate discipline program, "the employe . . . elect[s]" both "to work the days of suspension and waive an equivalent amount of vacation (annual leave), Personal Holiday, Compensatory Time or Earned Saturday Legal Holiday in lieu of serving the suspension without pay" and that "such disciplinary actions will be considered as a progressive step in the disciplinary process and will be maintained in the employe's Personnel File subject to [other provisions that neither party has asserted are pertinent to the instant dispute]."

While umpire Grenig was unaware of it, it is undisputed that Jackson had previously opted for the alternate discipline program with regard to the instant suspension.

Therefore, the award requirement that the State expunge Jackson's three day suspension be from his record requires the State to violate the plain and unambiguous Agreement provision that the instant suspension "will be maintained in the employe's Personnel File . . .". Furthermore, to the extent that the award would also require the State to reimburse Jackson for the three days of leave it charged him in lieu of his serving the suspension involved, the award would similarly require the State to violate the plain and unambiguous Agreement requirement that the employe electing alternate discipline "waive an equivalent amount of [leave] . . . in lieu of serving the suspension without pay." In both respects, the award would clearly "disregard or modify plain and unambiguous provisions." For those reasons, the Examiner concludes that the remedy ordered in the award fails to draw its essence from the Agreement.

The Union and Jackson argue that "by submitting the present grievance to arbitration, the Employer empowered Arbitrator Grenig to decide the issue of just cause regardless of the underlying terms of the agreement. The Employer's assertion that such an award does not draw its essence from the agreement. . .is absurd where it is undisputed that the Employer failed to assert the provision it now finds dispositive at any time prior to the issuance of the award. . .Clairvoyance is not in an arbitrator's job description." Union Reply Brief at 7. They also

argue that "By submitting the matter to arbitration without raising Art. 13/6/10, the Employer agreed to have the issue of just cause resolved without consideration of Art. 13/6/10." Union Reply Brief at 14. In support of those contentions, they cite federal case law such as PIGGLY WIGGLY V. PIGGLY WIGGLY LOCAL NO. 1, 611 F.2d 580, 584 (CA5, 1980)(the grievance submitted to the arbiter defines his authority without regard to whether the parties had a prior legal obligation to submit the dispute"); JOHNSON V. INTERNATIONAL UNION LOCAL NO. 23, 828 F.2d 961, 965 (CA3, 1987)("The arbitrator's ultimate authority is not limited to the issues the collective bargaining agreement requires to be submitted, but expands to include those issues the parties agreed to submit."); and JONES DAIRY FARM V. LOCAL NO. P-1236, UFCW, 760 F.2d 173, 176 (CA7, 1985), cert. den. 474 U.S. 845 (1985)("If a party voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it.")

Whatever significance that federal case law may have on the separate question of whether the State waived its right to assert that the instant grievance is nonarbitrable by submitting the issues to Umpire Grenig as it did, the Examiner does not find those cases to be persuasive authority for the proposition that the State's submission of those issues precludes the State from asserting or the Examiner from determining whether the particular remedy ordered by Umpire Grenig is unenforceable because it fails to draw its essence from the agreement. The federal courts, including the Seventh Circuit Court of Appeals, continue to recognize that an award, to be enforceable, must draw its essence from the agreement. For example,

> "our review is 'close to nonexistent' if the arbitrator 'interprets' rather than 'revises' the collective bargaining agreement. INDEPENDENT EMPLOYEES' UNION V. HILLSHIRE FARM CO., 826 F.2d 530, 532 (7th Cir. 1987)(quoting CAMACHO V. RITZ-CARLTON WATER TOWER, 786 F.2d 242, 244 (7th Cir. 1986). Specifically, we will not disturb an arbitration award so long as it 'draws its essence' from the labor agreement. [The Arbitrator] may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." ENTERPRISE WHEEL, 363 F.2d at 597. See also ROADMASTER CORP. V. PRODUCTION AND MAINTENANCE EMPLOYEES' LOCAL 504, 851 F.2d 886, 888 (7th Cir. 1988).

LADISH COMPANY, INC. V. IAM DISTRICT NO. 10, 966 F.2d 250, 252 (CA7, 1992).

In any event, it is well established in Wisconsin case law that

> The authority of the arbitrator to hear a grievance is not the same as the authority of the arbitrator to make a particular award and the distinction between the two concepts must remain clear. The collective bargaining agreement may permit or require the arbitrator to hear a dispute, but it may also restrict him from reaching a particular result by limiting his powers of review or relief. Christensen, "Labor Arbitration and Judicial Oversight," 19 Stan. L.R. 671, 686 (1967)(Book Review: R.W. Fleming, *The Labor Arbitration Process* (1965) and P.R. Hays, *Labor Arbitration: A Dissenting View* (1966)). This distinction has been recognized by this as well as other courts. See, MILW. BD. SCH. DIRS. V. MILW. TEACHERS' ED. ASSO., 93 Wis. 2d 415, 287 N.W. 2d 131 (1980); MILWAUKEE POLICE ASSO. V. MILWAUKEE, supra; WERC V. TEAMSTERS' LOCAL NO. 563, 75 Wis. 2d 602, 250 N.W. 2d 696 (1977); JT. SCHOOL DIST. NO. 10 V. JEFFERSON ED. ASSO., 78 Wis. 2d 94, 253 N.W. 2d 536 (1977); TRUCK DRIVERS & HELPERS UNION LOCAL 784 V. ULRY-TALBERT CO., 330 F.2d 562 (8th Cir. 1964); TEXTILE WORKERS UNION AMERICA V. AMERICAN THREAD CO., 291 F.2d 894 (4th Cir. 1961); ELECTRONICS CORP. OF AM. V. ELECTRICAL WORKERS LOCAL 272, 492 F.2d 1255 (1st Cir. 1975); WORLD AIRWAYS, INC. V. INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, 578 F.2d 800 (9th Cir. 1978)(Per Curiam).

CITY OF MILWAUKEE, above, at 97 Wis. 2d 15 at 23-24.

Whatever the answer may be to the question of whether the State waived its right to assert that Umpire Grenig was without authority in the first place to decide the issues submitted to him by the parties, it does not follow that by submitting the issues to him as they did, the parties authorized him to order a remedy that violates other plain and unambiguous Agreement provisions. Rather, as the Wisconsin Supreme Court held in CITY OF MILWAUKEE and MILWAUKEE PROFESSIONAL FIREFIGHTERS above, the arbitrator's remedy must draw its essence from the Agreement and cannot disregard or modify plain and unambiguous Agreement provisions.

The Examiner has therefore concluded that umpire's award exceeded his authority to the extent that it required the State to remove the suspension from Jackson's record and to restore the three days of paid leaved charged in lieu of the suspension. Accordingly, the Examiner has also concluded that by refusing to comply with those remedial elements, State did not violate SELRA in any respect, including the State's Sec. 111.84(1)(e), Stats., obligation, "to accept the terms of an arbitration award, where previously the parties have agreed to accept such award as final and binding upon them."

The Union's legitimate and understandable concerns about the finality of awards working both ways applies to the vast majority of awards. The Union's admonitions to its members about the limited scope of review of arbitration awards (as described by Hoeft in his testimony) is also entirely valid. Here, however, the award granted a remedy that disregards or modifies plain and unambiguous Agreement provisions, which is beyond the authority of a grievance arbitrator to do. In such circumstances, the award is one of those exceptional cases in which the WERC cannot require the State to abide by the award even though the parties have agreed that awards are final and binding.

Effect of Unconditional Submission to Arbitration on State's Claim that Award Exceeded Arbitrator's Authority

In light of the conclusion reached above that the particular award issued in this case is not enforceable under SELRA, the Examiner finds it unnecessary to address the parties' dispute about whether the State's agreement to unconditionally submit the issues to the umpire as it did waived the State's right to later claim that the umpire had no authority to hear or decide those issues in the first place.

As noted above, "The authority of the arbitrator to hear a grievance is not the same as the authority of the arbitrator to make a particular award and the distinction between the two concepts must remain clear. The collective bargaining agreement may permit or require the arbitrator to hear a dispute, but it may also restrict him from reaching a particular result by limiting his powers of review or relief. [citations omitted]." CITY OF MILWAUKEE, above, at 23-24. Whether or not the State is deemed precluded by waiver or estoppel from claiming that the umpire had no authority to hear or decide the issues submitted to him in the first place, see generally, MILAS V. LABOR ASSOCIATION OF WISCONSIN, INC., 214 Wis.2d 1 (1997), the Examiner concludes that the unconditional submission of issues the Umpire does not foreclose the Examiner from concluding, as he has above, that the remedy ordered by the Umpire is not enforceable because it does not draw its essence from the agreement. CITY OF MILWAUKEE, above; and MILWAUKEE PROFESSIONAL FIREFIGHTERS, above.

Effect of Sec. 788.10 on WERC Jurisdiction Regarding State Fraud Defense and Complaint

The Union and Jackson assert that the State's contentions in both cases that the award was procured by fraud within the meaning of Sec. 788.10(1) must be rejected because a circuit court proceeding brought pursuant to Sec. 788.10, Stats. was the exclusive forum in which the State could have raised that claim, and the State has failed to do so.

However, contrary to the Union's and Jackson's contentions, the WERC's jurisdiction to apply the Sec. 788.10 Stats., standards for vacating grievance arbitration awards in complaint cases seeking award enforcement is long and well established. For example, WERC's jurisdiction in that regard was expressly recognized in the municipal sector in MADISON METROPOLITAN SCHOOL DISTRICT V. WERC, 86 Wis.2d 249, 255-7 (Ct. App. 1978) (Any party may apply directly to circuit court within one year after the award for an order confirming the award or may apply within three months after the award is filed or delivered to vacate the award. Secs. 298.09 and 298.13. The court in reviewing the award pursuant to these motions applies the standards of Sec. 298.10(1). In the alternative, if one party refuses to comply with the award, a complaint may be filed with WERC, which also applies the standards of Sec. 298.10(1). WERC may then apply to the circuit court for enforcement of its order affirming the award, or either party may challenge the commission's order in circuit court under Ch. 227. Sec. 111.07(7) and (8)."); and in DANE COUNTY V. DANE COUNTY UNION LOCAL 65, 210 Wis.2d 268, 276 (Ct.App. 1997) ("When a prohibited practice complaint is filed with WERC alleging that an employer has refused to accept the terms of an arbitration award as final and binding, WERC also has jurisdiction to review the terms of the award.")

The same principles apply to disputes about grievance arbitration arising under SELRA. See, DISTRICT COUNCIL 48 V. SEWERAGE COMMISSION, 107 Wis.2d 590, 595 (Ct.App. 1982) (dicta), citing STATE EX REL. TEACHING ASSISTANTS ASSOCIATION V. UNIVERSITY OF WISCONSIN-MADISON, 96 Wis.2d 492, 504-5 (Ct. App. 1980) for the proposition that Sec. 111.86 of SELRA "brought arbitration between the state and state classified employes within the scope of ch. 298 [now ch. 788]." 107 Wis.2d at 595. Accordingly, the WERC has applied the standards now contained in Sec. 788.10, Stats., in complaint cases arising under SELRA in which award enforcement was sought. See, e.g., STATE OF WISCONSIN (SECURITY AND PUBLIC SAFETY), DEC. NO. 17313-B (WERC, 7/89).

Clearly, then, the availability of a Sec. 788.10 action to vacate the award does not preclude the State from asserting or the WERC from adjudicating a State defense based on alleged fraud in response to the Union's and Jackson's Case 382 complaint seeking enforcement of the instant award.

The Union and Jackson also argue that their pre-hearing motion to dismiss the State's Case 395 complaint should be granted on the grounds that a Sec. 788.10(1), Stats., action in circuit court is the exclusive forum in which the allegations contained in that complaint can be adjudicated. In support of that contention, they cite general principles such as those reiterated in NODELL INVESTMENT CORPORATION V. GLENDALE, 78 Wis.2d 416, 422 (1997) to the effect that "where a specified method of review is prescribed in an act creating a new right or conferring a new power, the method so prescribed is exclusive and if review is sought that method must be pursued."

In light of the decisions above recognizing the WERC's jurisdiction to address complaint allegations otherwise within its jurisdiction even if in doing so the WERC applies Sec. 788.10 decisional standards, the Examiner finds no merit in the Union's and Jackson's motion to dismiss the State's Case 385 complaint on that basis. Notably, the State does not request in its Case 385 complaint that the award be vacated. Hence, that complaint does not constitute an attempt to collaterally obtain an order vacating the award which the State did not seek directly by means of a Sec. 788 circuit court action. Therefore, if and to the extent that the allegations in the Case 385 complaint are timely and within the scope of unfair labor practices defined by SELRA, the Examiner will exercise the WERC's jurisdiction to resolve those disputes even if doing so requires application of Sec. 788.10, Stats., standards.

Merits of State's Allegation that Award was Procured by Fraud

The conclusion reached above, that the award is not enforceable could also make it unnecessary as a part of Case 382 to determine whether the award was procured by fraud. However, because the State's Case 395 complaint is based in part on that contention, the Examiner addresses that issue below.

The Examiner finds no merit in the State's contentions that the award was procured by fraud.

The meaning of the term "fraud" as used in Sec. 788.10(1), Stats., is not clear. The Wisconsin Supreme Court noted in RICHCO STRUCTURES V. PARKSIDE VILLAGE, INC., 82 Wis.2d 547, 564 Note 3 (1978) that "Parkside also asserts that Sec. 298.10(1)(a), Stats., encompasses only actual fraud. This court has not previously ruled on this point. The view we take of the scope of the evidentiary hearing makes it unnecessary for us to decide the question." The parties have not cited and the Examiner has not independently found any subsequent Wisconsin appellate court decision on that point either.

Black's Law Dictionary (4th edition, 1951) distinguishes actual from constructive fraud as follows,

> Fraud is either actual or constructive. Actual fraud consists in decide, artifice, trick, design, some direct and active operation of the mind; it includes cases of the intentional and successful employment of any cunning, deception, or artifice used to circumvent or cheat another; it is something said, done, or omitted by a person with the design of perpetrating what he knows to be a cheat or deception. Construction fraud consists in any act of commission or omission contrary to legal or equitable duty, trust, or confidence justly reposed, which is contrary to good conscience and operates to the injury of another. Or, as otherwise defined, it is

> an act, statement or omission which, if generally permitted, would be prejudicial to the public welfare, and yet may have been unconnected with any selfish or evil design. Or, according to Story, constructive frauds are such acts or contracts as, though not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with actual fraud.

It is factually disputed in this case is whether Jackson actually knew that he had waived the right to grieve and arbitrate the dispute that was ultimately decided by Umpire Grenig. The evidence satisfies the Examiner that Jackson did not in fact know that by filing the alternate discipline form he was waiving his right to pursue a grievance challenging the suspension on its merits. While Jackson should have known that from the clear statement to that effect on the form that he signed, the Examiner is persuaded by the Jackson's testimony that he did not read it. Accordingly, the Examiner is satisfied that Jackson thought, mistakenly, that he was entitled both to receive the alternate discipline and to later pursue his grievance that the suspension was not justified in the circumstances.

Neither the Union steward who wrote up and submitted Jackson's grievance nor WSEU District Representative Hoeft, who processed the grievance through the third and fourth steps of the grievance procedure, knew of the existence of the form prior to the issuance of the award, either. While Jackson's alternate discipline form shows a copy was supplied to the Union, the testimony indicates that the copy went to the local union president and not to the WSEU representative or to the WSEU office. Thus, even if the Union is as generally chargeable with knowledge of the contents of the form as the State is, the evidence establishes to the Examiner's satisfaction that the existence of that form was not actually known either to the Union steward or to the District Representative who advanced this matter through the grievance and umpire arbitration procedures.

The State's representatives involved in the arbitration also did not actually know of the existence of the form. While the State as a whole admittedly possessed a copy of Jackson's form opting the alternate discipline program, and while the form should have alerted the State's representatives that Grievant had previously opted to waive his right to grieve and arbitrate the suspension, for some reason that did not happen.

The State notes that Jackson submitted the form to Captain Parisi (tr. 50) rather than returning it to Personnel Manager Schneider as is called for on the form. However, the record establishes that the State gave effect to the form as if it had been properly and timely submitted by Jackson, and there is no contention or showing that Jackson was purposely attempting to avoid having the form reach Schneider's office.

The Examiner therefore finds that the award was the result of a mutual mistake on the part of all of the parties as to the availability of arbitration of the matter in the first place. The Examiner rejects the State's contentions that Jackson intentionally said nothing about having opted for the alternate discipline program at the arbitration hearing in an effort to deceive the State's representative to their detriment. In other words, the Examiner rejects the State's contention that the award resulted from actual fraud on the part of Jackson. Even if "fraud" as used in Sec. 788.10(1) extends beyond actual fraud, the Examiner concludes that the instant award was not procured by fraud within the meaning of that Section. As the first of the quoted passages from CITY OF MILWAUKEE, above, indicates, Wisconsin case law places a high value on the finality of grievance arbitration awards, such that the standards for review of awards are purposefully limited to that end. In that context, the Examiner finds it inappropriate to interpret that Section in such a way as to deem an award procured by fraud merely because, as here, the grievant involved participated in the arbitration hearing in a manner consistent with what turned out to be a mistaken belief about the extent of his rights under the Agreement.

Alleged Untimeliness of State Complaint Allegations

The Sec. 111.07(14), Stats., statute of limitations applicable to complaint proceedings under SELRA provides, "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged."

As the Union and Jackson correctly assert, if and to the extent that the State's complaint requests relief based on specific acts or unfair labor practices occurring more than one year prior to the State's filing of its complaint on April 26, 1995, those requests would be untimely and hence outside the WERC's jurisdiction to remedy.

On that basis, as the State has acknowledged, the only conduct by Jackson alleged in the State's complaint for which the WERC has jurisdiction to grant relief is Jackson's conduct at the January 27, 1994 hearing.

Alleged Violation of Sec. 111.84(2)(c), Stats., by Jackson

Sec. 111.84(2)(c), Stats., provides that it is an unfair labor practice for an employe individually or in concert with others . . . to refuse to bargain collectively . . . with the duly authorized officer or agent of the employer . . .".

"Collective bargaining" is, by definition, "the performance of the mutual obligation of the state as an employer . . . and the representatives of its employes." Sec. 111.81(1), Stats. Hence, by definition, collective bargaining necessarily involves interactions between a representative of employes and the State, not between individual employes and the State.

It follows that a refusal to bargain collectively within the meaning of Sec. 111.84(2)(c), Stats., could only be committed by a representative of employes such as the Union and not by an individual employe such as Jackson.

Accordingly the Examiner has dismissed the State's allegation that Jackson committed a refusal to bargain collectively unfair labor practice within the meaning of Sec. 111.84(2)(c), Stats.

Alleged Violation of Sec. 111.84(2)(d), Stats., by Jackson

Sec. 111.84(2)(d), Stats., provides that it is an unfair labor practice for an employe individually or in concert with others . . . to violate the provisions of any written agreement with respect to terms and conditions of employment affecting employes . . . ".

The Agreement, by its terms, is between the State and the Union. Jackson is neither the State nor the Union. He is not a party to the Agreement, even though the Union negotiated the Agreement on behalf of Jackson and other employes, and even though the Agreement affects the terms and conditions of Jackson's employment by the State. Hence, it is open to serious question whether Jackson, as an individual employe, could have violated the provisions of that Agreement within the meaning of Sec. 111.84(2)(d), Stats.

In any event, the Examiner concludes that Jackson did not violate that Agreement. The Examiner interprets the portion of 13/6/10 of the Agreement providing "If an employe chooses the option stated above, the right to grieve the disciplinary action under Article IV of the Agreement is waived" as relieving the State of any obligation to process or arbitrate a grievance such as that at issue herein. However, neither that provision of the Agreement nor any other has been cited that specifically and expressly prohibits the Union or an individual employe from attempting to submit such a grievance to arbitration. See, WISCONSIN STATE EMPLOYEES UNION, DEC. NO. 22320-B (WERC, 7/86) (Union filing of grievance not in compliance with contractual time limit for grievance filing affected Union's right to a resolution of the grievance on its merits in the contractual procedure, but it did not constitute an independent violation of the agreement by the Union.); cf. STATE OF WISCONSIN, DEC. NOS. 23161-B and 23317-B, (1/87, Roberts)(Union filing of complaint that was ultimately determined to be without merit did not constitute a violation of collective bargaining agreement by the Union), aff'd, 23161-C and 23317-C (WERC, 9/87).

Accordingly the Examiner has dismissed the State's allegation that Jackson committed a violation of agreement unfair labor practice within the meaning of Sec. 111.84(2)(d), Stats.

Alleged Violation of Sec. 111.84(3), Stats., by Jackson

The Examiner has also concluded that Jackson did not violate Sec. 111.84(3), Stats., by participating in the arbitration hearing after having waived his right to do so by opting for the alternate discipline procedure.

Section 111.84(3) reads as follows: "It is an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subs. . . . (2)." Subsection (2) of Sec. 111.84(3), Stats., consists of six parts, (a)-(f).

By participating in the arbitration hearing without informing those present that he had previously opted for the alternate discipline procedure, Jackson caused the Union to pursue on behalf of employes a grievance that the State was not required to process or arbitrate under the terms of the Agreement. However, Jackson did not thereby cause the Union to commit an unfair labor practice within the meaning of any portion of Subsection 111.84(2), Stats.

More specifically, Jackson did not cause the Union "to coerce or intimidate an employe in the enjoyment of the employe's legal rights" within the meaning of Sec. 111.84(2)(a), Stats.

Nor did Jackson cause the Union to "coerce, intimidate or induce any officer or agent of the employer to interfere with any of the employer's employes in the enjoyment of their legal rights . . or to engage in any practice with regard to its employes which would constitute an unfair labor practice if undertaken by the officer or agent on the officer's or agent's own initiative" within the meaning of Sec. 111.84(2)(b), Stats.

Jackson's participation in the arbitration also did not cause the Union to "refuse to bargain collectively" with the State within the meaning of Sec. 111.84(2)(c), Stats. See, WISCONSIN STATE EMPLOYEES UNION, DEC. NO. 22320-B (WERC, 7/86)(Union filing of grievance that was not in compliance with contractual time limit for grievance filing did not constitute a Union refusal to bargain collectively.); cf. STATE OF WISCONSIN, DEC. NOS. 23161-B and 23317-B, (1/87, Roberts)(Union filing of complaint that was ultimately determined to be without merit did not constitute a refusal to bargain collectively), aff'd, 23161-C and 23317-C (WERC, 9/87); and AUGUSTA SCHOOL DISTRICT, DEC. NO. 27857-A (2/94, Shaw), aff'd by operation of law, -B (WERC, 3/94)(while allegedly premature filing of interest arbitration petition might be part of a totality of circumstances constituting a refusal to bargain collectively, it could not constitute a MERA refusal to bargain standing alone.)

Nor did Jackson's participation in the arbitration cause the Union to "violate the provisions of any written agreement with respect to terms and conditions of employment

affecting employes" within the meaning of Sec. 111.84(2)(d), Stats. Article 13/6/10 of the Agreement provides, "If an employe chooses the option stated above, the right to grieve the disciplinary action under Article IV of the Agreement is waived" The Examiner interprets that provision to relieve the State of any obligation to process or arbitrate a grievance such as that at issue herein. However, neither that provision of the Agreement nor any other expressly prohibits the Union from attempting to submit such a grievance to arbitration. See, WISCONSIN STATE EMPLOYEES UNION, DEC. NO. 22320-B (WERC, 7/86) (Union filing of grievance not in compliance with contractual time limit for grievance filing affected Union's right to a resolution of the grievance on its merits in the contractual procedure, but it did not constitute an independent violation of the agreement by the Union.); cf. STATE OF WISCONSIN, DEC. NOS. 23161-B and 23317-B, (1/87, Roberts) (Union filing of complaint that was ultimately determined to be without merit did not constitute a violation of collective bargaining agreement by the Union), aff'd, 23161-C and 23317-C (WERC, 9/87).

Jackson's participation in the arbitration clearly did not cause the Union "to engage in, induce or encourage any employes to engage in a strike, or concerted refusal to work or perform their usual duties as employes" within the meaning of Sec. 111.84(2)(e), Stats.

And finally, Jackson's participation in the arbitration also clearly did not cause the Union "to coerce or intimidate a supervisory employe, officer or agent of the employer, working at the same trade or profession as the employer's employes, to induce the person to become a member of or act in concert with the labor organization of which the employe is a member" within the meaning of Sec. 111.84(2)(f), Stats.

For those reasons, then, the Examiner has dismissed the State's allegation that Jackson committed an unfair labor practice within the meaning of Sec. 111.84(3), Stats.

Dismissal of Both Complaints

For the foregoing reasons, the Examiner has dismissed both of the complaints in their entirety.

Requests for Costs and Attorney's Fees

All parties have variously requested in their pleadings that the opposing party or parties ordered to pay their attorneys fees and/or costs and disbursements.

The circumstances in which the WERC grants such requests are quite narrow. See, e.g., WISCONSIN DELLS, DEC. NO. 25997-C (WERC, 8/90) and MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 16471-B (WERC, 5/81) (position taken must be "frivolous," not merely "debatable"). The Examiner is not persuaded that the instant complaint falls within that narrow range.

Dated at Shorewood, Wisconsin, this 4th day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

MLG/gjc
28379-B.D